

ARKANSAS COURT OF APPEALS

DIVISION I
No. CA08-474

JOSEPH V. LIBERTO		
	APPELLANT	
V.		
SCOTT WADDELL and MIXON & MCCAULEY, P.A.		
	APPELLEES	

Opinion Delivered November 12, 2008

APPEAL FROM THE CRAIGHEAD
COUNTY CIRCUIT COURT,
[NO. CV-07-29]

HONORABLE JOHN B. PLEGGÉ,
JUDGE

AFFIRMED

LARRY D. VAUGHT, Judge

This is the second appeal by appellant Joseph Liberto arising from his legal-malpractice action against appellees Scott Waddell and his law firm, Mixon & McCauley, P.A. In *Liberto v. Waddell*, 2003 WL 21277374 (Ark. App. June 4, 2003) (unpublished opinion), we affirmed the trial court’s summary-judgment order as it related to lay-witness testimony; however, we reversed the order and remanded the case because the trial court failed to rule on an issue of expert-witness discovery. Following remand, the trial court entered another summary-judgment order, dismissing Liberto’s malpractice claim. We affirm.

In 1996, Liberto hired appellees to represent him in a case against his former employer, Consolidated Freightways. He alleged discrimination. The case was tried in August 1997 to a federal jury, which returned a verdict in favor of Consolidated Freightways. On August 28, 1998, Liberto filed a legal-malpractice action against appellees, claiming that they failed to (1)

present lay-witness testimony of Brenda Tart, Valerie Helton, and Bobby Kirkesy; (2) present testimony from Liberto's treating physician; and (3) conduct the discovery necessary to allow his other experts to testify.

The trial court entered an order, granting appellees' motion for summary judgment. The court found that judgmental immunity applied. The court further found that appellees' motion to strike the appellant's expert witness (for failure to timely disclose the expert) was moot.

In his first appeal, we affirmed, holding that it was within the discretion of Waddell, as Liberto's attorney, to determine whether he would call lay witnesses to testify. However, we reversed and remanded the issue that appellees failed to respond to expert-witness discovery requests, holding that the trial court failed to rule on it. We further directed the trial court to "address the issue by whatever method it deem[ed] appropriate."

On remand, Liberto amended his complaint, adding the claim that appellees were negligent in failing to investigate the testimony of lay witness JoAnn Davis. Appellees moved for summary judgment on that claim, arguing that the amendment to the complaint was barred by res judicata and the statute of limitations, and that there was a lack of evidence supporting the malpractice claim.¹ The trial court granted the motion. Liberto timely appealed from the summary-judgment order.

¹Appellees' motion for summary judgment also sought dismissal of the expert-witness issue. Liberto conceded this issue in his response to the motion for summary judgment.

Summary judgment is appropriately granted by a trial court only when there are no genuine issues of material fact to be litigated, and the party is entitled to judgment as a matter of law. *Delanno, Inc. v. Peace*, 366 Ark. 542, 237 S.W.3d 81 (2006). Once the moving party has established a prima facie entitlement to summary judgment, the opposing party must meet proof with proof to demonstrate the existence of a material issue of fact. *Id.* On review, we determine if summary judgment was appropriate based on whether the evidentiary items presented by the moving party in support of the motion leave a material fact unanswered. *Id.* We review the evidence in a light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. *Id.*

At trial, the parties devoted much argument to the issues of relation back pursuant to Rule 15 of the Arkansas Rules of Civil Procedure, res judicata, the statute of limitations, and whether Davis's testimony supported Liberto's claim for legal malpractice. On appeal, the parties make the same arguments, but add arguments relating to the mandate rule and the doctrine of law of the case. We address the arguments relating to the law-of-the-case doctrine first because they are dispositive.²

The law-of-the-case doctrine provides that the decision of an appellate court establishes the law of the case for the trial court upon remand, and for the appellate court itself upon

² While appellees failed to specifically argue the law of the case below, they are not precluded from doing so on appeal. *See Landers v. Jameson*, 355 Ark. 163, 132 S.W.3d 741 (2003) (considering the doctrine of the law of the case despite the fact that neither party raised it on appeal and the trial court did not rule on it). Furthermore, on appeal, we are permitted to affirm the trial court for any reason. *Id.* (citing *Alexander v. Chapman*, 299 Ark. 126, 771 S.W.2d 744 (1989)).

subsequent review, and is conclusive of every question of law and fact previously decided in the former appeal, and also of those that could have been raised and decided in the first appeal, but were not presented. *Turner v. Nw. Ark. Neurosurgery Clinic, P.A.*, 91 Ark. App. 290, 210 S.W.3d 126 (2005). The rule is grounded on a policy of avoiding piecemeal litigation. *Id.* Thus, the law-of-the-case doctrine prevents consideration of an argument that could have been made at trial and also prevents consideration of an argument that could have been raised in the first appeal and is not made until a subsequent appeal. *Id.* However, when the evidence materially varies, the law-of-the-case doctrine has no application. *Id.* The law-of-the-case doctrine is conclusive only where the facts on the second appeal are substantially the same as those involved in the prior appeal, and it does not apply if there was a material change in the facts. *Id.*

In the case at bar, the doctrine of the law of the case applies, barring Liberto's new claim that the appellees were negligent in failing to investigate the testimony of lay witness Davis. In the first appeal we resolved the issue of whether appellees were negligent in the presentation (or lack thereof) of lay-witness testimony, holding that judgmental immunity applied. That is the law of this case. The new claim involving Davis's testimony falls squarely within that holding. Moreover, the testimony of Davis could have and should have been raised in the first appeal. Finally, there is no evidence in this case that the facts have changed since the first appeal. Rather, the facts in this appeal are substantially the same as those involved in the first.

Therefore, we affirm the trial court's grant of summary judgment based on the doctrine of the law of the case. With this holding, we need not address the remaining arguments made by Liberto on appeal as they are moot.

Affirmed.

GLADWIN and HUNT, JJ., agree.